

***United States Court of Appeals
for the Second Circuit***



APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

77-6047

-----:
WALTER WOE, et al.,

Plaintiffs-Appellants,

- v. -

JOSEPH C. CALIFANO, et al.,

Defendants-Appellees.
-----:



YETTA YOE, et al.,

Plaintiffs-Appellants,

- v. -

Docket No. 77-6047

LAWRENCE C. KOLB, M.D., et al.,

Defendants-Appellees.
-----:

KENNETH KOE, et al.,

Plaintiffs-Appellants,

- v. -

JOSEPH C. CALIFANO, et al.,

Defendants-Appellees.
-----:

APPENDICES

A. Index on Appeal

B. Complaint in Kenneth Koe et al. v. David Mathews, et al., U.S.D.C., E.D.N.Y. 76-C-642

C. Memorandum by Hon. Edward R. Neaher, U.S.D.J.,
E.D.N.Y., January 13, 1977. Decision not reported.

PAGINATION AS IN ORIGINAL COPY

APPENDIX "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----:
KENNETH KOE, et al.,

Plaintiffs,

- v. -

76 Civ. 642 (ERN)

DAVID MATHEWS, et al.,

Defendants.
-----:

INDEX ON APPEAL

Photocopy of docket entries	A-B
Transfer received from Southern District of New York includes summons; complaint; and order allowing use of pseudonyms; and allowing prosecution <u>in forma pauperis</u> .	1
Order sealing prior order allowing use of pseudonym.	2
Motion by federal defendants dated May 11, 1976 to dismiss complaint.	3
Motion by plaintiffs dated May 12, 1976 to amend complaint.	4
Memorandum and Order of January 13, 1977 dismissing action against federal defendants, etc.	5
Judgement of January 14, 1977 dismissing action against federal defendants, etc.	6
Notice of Appeal.	7
Clerks Certificate.	8

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----:

WALTER WOE (a pseudonym), by his mother
and guardian, WILMA WOE (a pseudonym),
on behalf of themselves and all others
similarly situated,

Plaintiffs,

- against -

75 Civ. 1029

DAVIC MATHEWS, individually and as
Secretary of the United States
Department of Health, Education and
Welfare; THE UNITED STATES OF AMERICA;
HUGH L. CAREY, individually and as
Governor of the State of New York;
LAWRENCE L. KOLE, M.D., individually
and as Commissioner of Department of
Mental Hygiene of the State of New York;
MORTON B. WALLACH, M.D., individually
and as Director of Brooklyn State
Hospital; and THE STATE OF NEW YORK,

Defendants.

-----:

INDEX ON APPEAL

Photocopy of docket entries	A-E
Order allowing complaint to be filed in forma pauperis. (Sealed) in U.S.D.C./ EDNY vault	1 missing
Summons, additional summons and complaint.	2
Order permitting use of pseudonyms and sealing order. in U.S.D.C./ EDNY vault	3 missing
Memorandum of law in opposition to plaintiffs' motion to determine the class.	4
Order to show cause for an order to maintain case as a class action.	5
Memorandum of law in support of plaintiffs' motion to maintain this lawsuit as a class action.	6
Second and additional memorandum of law in support of plaintiffs' motion to maintain this lawsuit as a class action.	7
Memorandum order denying motion to certify class action without prejudice to renewal in the event a three-judge court is con- vened.	8

Demand pursuant to local Civil Rule One.	9
Memorandum of law in opposition to plaintiffs' application for a class action certification.	10
Motion for reconsideration and reargument of decision denying plaintiffs' motion for class action certification.	11
Notice of appeal.	12
Additional summons.	13
Amended complaint for declaratory judgments, etc.	14
State defendants' motion for an order pursuant to Rule 12.	15
State defendants' memorandum of law in support of motion to dismiss.	16
Motion to clarify further proceedings under Civil Rule One.	17
Order extending time for defendants to answer.	18
Motion to reschedule reargument of denying class action.	19
State defendants' additional motion to dismiss.	20
Memorandum of law in support of state defendants' motion to dismiss amended complaint.	21
Federal defendants' motion for an order dismissing plaintiffs' amended complaint.	22
Federal defendants' memorandum of law.	23
Additional summons.	24
Order extending time to answer the complaint and amended complaint.	25
Order of discontinuance of appeal.	26
Memorandum of law of plaintiffs in opposition to defendants' motion to dismiss.	27
Supplemental summons returned.	28
Omitted.	29
Memorandum and order denying plaintiffs' motion for a temporary restraining order.	30
Plaintiffs' notice of appeal.	31
Order permitting use of pseudonym, Frank Foe, and sealing order. in U.S.D.C./ EDNY vault	32 missing

State defendants' memorandum of law.	33
Notice of motion to further amend amended complaint	34
Stipulation of discontinuance of appeal.	35
Plaintiffs' memorandum in further opposition to motions to dismiss amended complaint.	36
Memorandum and order dismissing the complaint as to the federal defendants, denying state defendants' motion to dismiss as to them, denying plaintiffs' motion to amend complaint and certifying a limited class action.	37
Plaintiffs' notice of appeal.	38
Order extending state defendants' time to answer.	39
Notice of motion by state defendants for reconsideration of class action designation (missing).	40
Memorandum of law in support of state defendants motion. (missing)	41
Letter from Morton Birnbaum to: Louis Thrasher, Esq., Director Special Litigation Section Civil Rights Division United States Department of Justice	42
Answer of state defendants.	43
Letter to Judge Neaher from Assistant US Attorney Cyril Hyman in response to the "Second and Additional Memorandum of Law in Support of Plaintiffs' Motion to Maintain this Lawsuit as a Class Action.	44
Letter to Judge Neaher from New York State Attorney General.	45
Copy of letter to Commissioner Berger from Regional Commissioner Smith regarding Pilgrim Psychiatric Center.	46
Letter to Judge Neaher from Morton Birnbaum, plaintiffs' attorney, submitting further objective data to support plaintiffs' claims.	47
Letter to Judge Neaher from Morton Birnbaum regarding filing of similar action, <u>Yetta Yoe et al v Lawrence C. Kolb</u> .	48
Letter to <u>Pro Se</u> Clerk regarding proposed <u>ex parte</u> order for permission to use pseudonym, Frank Foe.	49
Letter to Judge Neaher regarding oral argument of same date from Morton Birnbaum.	50

Copy of letter to Judge Neaher from Morton Birnbaum regarding plaintiffs' third claim for relief in their amended complaint.	51
Copy of letter to Judge Neaher from Morton Birnbaum regarding matters material to the issues.	52
Copy of letter to Clerk of Court regarding transference of similar <u>Yetta Yoe</u> case to EDNY from New York Attorney General's Office.	53
Memorandum in opposition to plaintiffs' motion to determine the class.	54
Supplemental memorandum of law in opposition to plaintiffs' motion to determine the class.	55
Unsigned order to show cause and temporary restraining order upon the annexed affidavit of Morton Birnbaum.	56
Unsigned order to show cause and temporary restraining order upon the annexed affidavit of Morton Birnbaum.	57
Memorandum of law in support of plaintiffs' motion for a temporary restraining order.	58
Unsigned order allowing the use of pseudonyms for additional proposed plaintiffs and sealing this order.	59
Copy of letter from Lawrence Kolb to David Mathews.	60
Plaintiffs' motion returnable May 21, 1976 to amend the complaint, etc.	61
Copy of Judgement of Court of Appeals dismissing prior appeal.	62
Memorandum and Order of January 13, 1977 consolidating this action with <u>Yoe v. Kolb</u> , etc.	63
Judgement of January 14, 1977 dismissing action as to federal defendants.	64
Notice of Appeal.	65
Scheduling Order from Court of Appeals, etc.	66
Federal defendants suggestion of death of plaintiff, Walter Woe.	67
Remand from Court of Appeals for order under 54 (b), etc.	68
Copy of letter of December 15, 1976 from Morton Birnbaum (Counsel) to Hon. E. J. Neaher informing Court of death of plaintiff Walter Woe, etc.	69

EXHIBITS

- A. Birnbaum, M.: Some Remarks on The "Right to Treatment," 23 ALA. L. REV. 623, 1971.
- B. Birnbaum, M.: The Right to Treatment: Some Comments on Its Development, IN AYD, F.J., MEDICAL, MORAL AND LEGAL ISSUES IN MENTAL HEALTH CARE, at 97 (1974).
- C. Amended complaint in Legion v. Richardson, 354 F. Supp. 456 (S.D.N.Y. 1973).
- D. Amicus curie brief of American Medical Association
- E. Amicus curie brief of American Nursing Association
- F. Amicus curie brief of American Orthopsychiatric Association
- G. Amicus curie brief of American Psychiatric Association
- H. Amicus curie brief of American Public Health Association
- I. Amicus curie brief of Association of Black Psychologists
- J. Amicus curie brief of Black Psychiatrists of America
- K. Amicus curie brief of National Medical Association
- L. Amicus curie brief of Congress of Racial Equality
- M. Amicus curie brief of National Association for the Advancement of Colored People
- N. Amicus curie brief of National Black Feminist Organization
- O. Amicus curie brief of National Conference of Black Lawyers
- P. Amicus curie brief of National Urban League
- Q. Amicus curie brief of the State of Ohio
- R. Amicus curie brief of the State of Oregon
- S. Amicus curie brief of the State of Pennsylvania
- T. Amicus curie brief of National Health Law Program

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----;
YETTA YOE, et al.,

Plaintiffs,

- v. -

75 Civ. 2178 (ERN)

LAWRENCE C. KOLB, M.D., et al.,

Defendants.
-----;

INDEX ON APPEAL

Photocopy of docket entries	A-B
Transfer received from Southern District of New York includes summons; complaint; order allowing prosecution as a poor person; order allowing use of pseudonym; order sealing orders allowing prosecution as a poor person; etc.	1
Letter of December 31, 1975 requesting assignment of action to Hon. E. R. Neaher.	2
Answer of state defendants.	3
Notice of motion returnable April 30, 1976 by federal defendants to dismiss.	4
Notice of motion returnable May 21, 1976 by plaintiffs to amend the complaint, etc.	5
Memorandum and Order of January 13, 1977 dismissing action against federal defendants, etc.	6
Judgement of January 14, 1977 dismissing action against federal defendants, etc.	see 75 Civ. 1029
Clerks Certificate	7

76C		642								APPEAL		0719			
207	1	76	0642	04	07	76	2	440	5*						

PLAINTIFFS

DEFENDANTS

KENNETH ROE et al.

HEW

KENNETH ROE, LAWRENCE LOE,
MATHEW MOE & NATHAN NOE,
(All pseudonyms) on behalf
of themselves and all
others similarly situated

DAVID F. MATHEWS, as Secretary
the United States Department
Health, Education & Welfare;
BERNICE BERNSTEIN, as Regional
Commissioner of the United States
Department of Health, Education
Welfare (Region II); and,
THE UNITED STATES OF AMERICA

CAUSE

28 USC 1346--DECLARATORY JUDGMENT; INJUNCTION & FOR COMPENSATORY &
PUNITIVE DAMAGES

*TRANSFERRED FROM SDNY

ATTORNEYS

FOR PLTFFS:
Morton Birnbaum
225 Tompkins Ave.
Brooklyn, N.Y. 11216
852-5252

A-8

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID		STATISTICAL CARD	
	DATE	RECEIPT NUMBER	C. D. NUMBER	CARD
				DATE MAIL
				JS 5 JS 6

76C 642

KOE v. HEW

DATE NR.

PROCEEDINGS

4-7-76 Cause on transfer rec'd from SDNY & filed. Acknowledgment mailed to Clerk for receipt of two slips and three sealed envelopes said to contain order, summons, complaint and order. (1)

04-09-76 By NEAHER, J.--Memorandum order dtd 4-8-76 filed. The order of 11-24-75 permitting pliffs to proceed using pseudonyms is to be sealed with the order granting Nathaniel Noe permission to proceed in forma pauperis, except to the attorneys for the parties. The complaint and summons are to be unsealed. (Documents sealed & placed in the vault). (2)

5-11-76 Notice of motion ret 5-21-76 for an order dismissing this action filed. (3)

5-14-76 Notice of motion ret. 5-21-76 re; to amend the complaint etc., filed. (4)

1/13/77 By Neaheer, J Memo and Order dtd 1/13/77 filed re plttf's motion to consolidate the Woe vs Mathews and Yoe vs Kolb actions is granted. The proposed consolidation of the Koe vs Mathews action, now dismissed, is denied. The cases are to be consolidate under the caption Woe vs Carey 75 C 1029. Accordingly, the motios to amend the complaints are denied. Upon plttf's application and there being no just reason for delay, the Clerk fo Court is directed to enter judgement in favor of fdederal defts dismissing the actions Woe vs Mathews, 75C 1029 and Yoe vs Kolb 75 C 2178. as to those defts. The clerk is also directed to enter judge ment in favor of defts dismissing the complaint in the action, Koe vs Mathews 76C 642. ~~See 75C 1029~~. (5)

1-19-77 JUDGE-
JUDGMENT dtd 1-14-77 that 75C 1029 and 75C 2178 are dismissed as to the Federal Defts, and this action (76C 642) is dismissed. See 75C 1029. mg

2-14-77 NOTICE OF APPEAL FILED. (plttfs) *See 75C 1029*

3/29/77 Copy of letter of MORTON BIRNBAUM (Counsel for plttfs) TO NEAHER, J. dtd 12/15/76 filed. (FILED IN 75-C-1029 document# 69) *g.*

DATE	NR.	PROCEEDINGS
6-27-75		By DEANELL, J. - Order dtd 6-27-75 allowing complaint to be filed in forma pauperis filed. (1)
6-27-75		Complaint filed. Summons and additional summons issued. (2)
6-27-75		By NEAHER, J. - Order dtd 6-27-75 permitting use of pseudonyms and to seal this order filed. (3)
6-27-75		Documents 1 & 3 sealed & placed in vault as directed. (4)
7-15-75		Memorandum of law in opposition to plttfs' motion to determine the class filed. (4)
7-17-75		By NEAHER, J. - Order to show cause dtd 7-8-75 for an order to maintain cases as a class action, ret 7-18-75 at 2 P.M. filed. (5)
7-17-75		Memorandum of Law in support of plttfs' motion to maintain this lawsuit as a class action filed. (6)
7-18-75		Before NEAHER, J. - Case called. Motion re Rule 23 argued. Decision reserved. Additional papers to be submitted. (7)
7-25-75		Second and Additional Memorandum of Law in Support of Pltff's Motion to Maintain this Lawsuit as a Class Action filed. (7)
7-31-75		By NEAHER, J. - Memorandum order dtd 7-31-75 denying motion to certify class action without prejudice to renewal in the event a three-judge court is convened filed. (copies mailed to attys). (8)
8-4-75		Demand pursuant to local civil rule one filed. (9)
8-7-75		Defts Cary, Kolb, Wallach and the State of New York's Memorandum of Law in opposition to plttfs application for a class action certification filed. (10)
8-11-75		Notice of motion ret. 9-12-75 for reconsideration and reargument of decision denying plttfs' motion for class action certification filed (11)
8-11-76		NOTICE OF APPEAL FILED. (Duplicate mailed to C of A with copies of docket entries. jn.) (C&D mailed to plttfs' atty) (12)
8-14-75		Additional summons ret and filed/HEW served by certified mail. Deft Hugh L. Carey service made by certified mail/ State of NY, Lawrence C. Kolb & Morton B. Wallach served personally. (13)
8-15-75		Amended complaint for declaratory judgments etc filed. (14)
8-20-75		Notice of motion ret 9-26-75 for an order pursuant to Rule 12 filed. (15)
8-20-75		Memorandum of Law in support of motion to dismiss filed. (16)
8-20-75		Notice of motion to clarify further proceedings under civil Rule One filed. (17)
8-22-75		By NEAHER, J. - Order dated 8/21/75 filed that the time of the debt to answer the complaint is extended to Sept. 15, 1975 (18)
8-25-75		Notice of rescheduling of motion to reargue decision denying class action to 9-19-75 filed. (19)
8-13-75		Notice of Motion, ret. 9/26/75 filed re: M to dismiss, etc. (20)
8-13-75		Memorandum of Law in Support of State Deft's Motion to Dismiss Amended Complaint filed. (21)
8-15-75		Notice of motion ret 9-26-75 for an order dismissing plttfs amended complaint filed. (22)
8-15-75		Memorandum of Law filed. (23)
8-19-75		Summons filed. (24)
8-19-75		Supplemental summons issued. (25)
8-22-75		By NEAHER, J. - Order dtd 9-19-75 extending time to answer the complaint & amended complaint to 9-26-75 filed. (25)
8-25-75		By NEAHER, J. - Order of Discontinuance dated 9/24/75 filed KKKK P.C. mailed to the attys. (26)
8-25-75		Memorandum of Law of Pltff's filed. (27)

PLAINTIFF	DEFENDANT	DOCKET NO. <u>75C-1029</u>
WALTER WOE, et al	CASPER WEINBERGER, et al	PAGE ____ OF ____ PAGES

DATE	NR.	PROCEEDINGS
9-26-75		Before NEAHER, J. - Case called. Attys for all sides present. Pltff's motion for reconsideration of decision of 7-31-75 and deft's motion to dismiss complaint argued. Decision reserved. (28)
11/3/75		Supplemental Summons read and filed. Executed. (28)
11-18-75	By NEAHER, J. - Order dtd 11-18-75 granting extension to	file brief to 11-21-75 filed for document #20
11-19-75		Before NEAHER, J. - Case called. Pltff moves to add certina defts and amend the complaint. Decsion reserved. Pltff moves for a preliminary injunction. Decision reserved. Pltff moves for a TRO, decision reserved. (mg) (30)
11-21-75		By NEAHER, J. - Memorandum and Order dtd 11-20-75 denying plttf's motion for a temporary restraining order filed. (copies mailed to attys). (30)
11-21-75		Pltff's notice of appeal filed. Copy sent to U.S. Atty/EDNY, the N.Y.S. Atty Gen. and to C of A with copy of docket entries. (31)
11-24-75		By NEAHER, J. - Order permitting use of pseudonym, Frank Foe, and Sealing this order filed, Ordered that this order and the annexed papers be sealed except to the attys for the parties. (32)
11-24-75		Document #32 sealed. (mg) (32)
12-1-75		Memorandum of Law in opposition to plttf's motion to add a new State deft filed. (mg) (33)
12/8/75		Notice of motion and Affidavit and Brief of Morton Birnbaum filed. (34)
12-12-75		By NEAHER, J. - Stipulation of discontinuance of the appeal filed. (35)
12-29-75		Pltffs' memorandum in opposition to motion to dismiss the amended complaint etc filed. (mg) (36)
12-30-75		Before NEAHER, J. - Case called. Claims against the Federal defts dismissed. Memorandum to be submitted by Court. Pltff's motion to amend the action by including new plttfs and new claims denied. Case adj'd w/o date. (mg) - (37)
1-16-76		By NEAHER, J. - Memorandum and Order dtd 1-14-76 dismissing the complaint as to federal defts, denying State defts' motion to dismiss as to them, denying plttfs' motion to amend complaint, and certifying a limited class action filed (p/c mailed to attys). (37)
1-30-76		Notice of appeal filed. Copies mailed to Co of AA and parties, Judge notified. (38)
2-2-76		By NEAHER, J. - Order extending NYS time to answer to 2-17-76 filed (39)
2-9-76		Notice of motion ret. 3-12-76 filed. (40)
2-9-76		Memo of law in support of defts. motion for reconsideration of class action designation filed. (41)
2-17-76		Copy of letter from Morton Birnbaum to Louis Thrasher filed. (42)
2-18-76		ANSWER OF STATE DEFTS FILED. (43)
3-5-76		Lttr dtd 7-29-75 to Judge Neaher from Asst. US ATTY CYRIL HYMAN in response to the "Second and Additional Memorandum of Law in Support of Pltffs' Motion to Maintain this Lawsuit as a Class Action" filed. (44)
3-5-76		Lttr dtd 9-8-75 to Judge Neaher from Atty General's Office filed. (45)
3-5-76		Copy of lttr dtd 10-30-75 to Commissioner Berger from Regional Commissioner Smith re Pilgrim Psychiatric Center filed. (46)

PLAINTIFF		DEFENDANT	75C 1029
WOE		H.E.W.	DOCKET NO. _____ PAGE ____ OF ____ PAGES
DATE	NR.	PROCEEDINGS	
3-5-76		Lttr dtd 11-5-75 to Judge Neaher from Morton Birnbaum, Plntffs' Atty, submitting further objective data to supprt plntffs' claims filed. (47)	
3-5-76		Lttr dtd 11-8-75 to Judge Neaher from Morton Birnbaum re filing of similar action, Yetta Yoem et al v Lawrence C. Kolb, filed. (48)	
3-5-76		Lttr dtd 11-18-75 to Pro Se Clerk re proposed <u>ex pa te</u> order for permission to use pseudonym, Frank Foe, filed. (49)	
3-5-76		Lttr dtd 11-19-75 to Judge Neaher re oral argument of same date. from Morton Birnbaum filed. (50)	
3-5-76		Copy of letter dtd 12-4-75 to Judge Neaher from Morton Birnbaum re plntffs' third claim for relief in their amended complaint filed. (51)	
3-5-76		Copy of letter dtd 12-9-75 to Judge Neaher from Morton Birnbaum re XXXXXXXXXX matters material to the issues filed. (52)	
3-5-76		Copy of lttr dtd 12-31-75 to Clerk of Court re transference of similar Yetta Yoe case to EDNY XXXXXXXXXX from Atty Gen.'s Office filed. (53)	
3-5-76		Memorandum in Opposition to Plntff's Application for Preliminary Injunction filed. (54)	
3-5-76		Supplemental Memorandum Of Law in Opposition to Plntffs' Motion to Determine the Class filed. (55)	
3-5-76		Unsigned Order to Show Cause and Temporary Restraining Order upon the annexed affidavit of M. Birnbaum sworn to 11-14-74 filed. (56)	
3-5-76		Unsigned Order to Show Cause and Temporary Restraining Order upon the annexed affidavit of M. Birnbaum sworn to 11-18-75 filed. (57)	
3-5-76		Memorandum of Law in Support of Plntffs' Motions for a Temporary Restraining Order, etc. filed. (58)	
3-5-76		Unsigned Order allowing use of pseudonyms for affitions ¹ Proposed plnaffs and sealing this order etc. filed. (59)	
3-5-76		Copy of lttr dtd 11-18-75 from Lawrence Kolb to David Mathews filed. (60)	
3-22-76		Above record certified and sent to the Court of Appeals. (61)	
5-14-76		Notice of motion ret. 5-21-76 re: to amend the complaint etc., filed. (62)	
6-11-76		Cert. copy of judgment from C of A dismissing the appeal filed. (63)	
1/13/77		By Neaher, J Memo and Order dtd 1/13/77 filed re plntff's motion to consolidate the Woe vs Mathews and Yoe vs Kolb actions is granted. The proposed consolidation of the Koe vs Mathews action, now dismissed, is denied. The cases are to be consolidated under the caption Woe vs Carey, 75C 1029. Accordingly, the motions to amend the complaints are denied. Upon plntffs application and there being no just reason for delay, the clerk of the court is directed to enter judgement in favor of federal defts dismissing the actions Woe vs Mathews 75C 1029; and Yoe vs Kolb 75C 2178 as to those defts. The clerk is also directed to enter judgement in favor of defts dismissing the complaints in the action Koe vs Mathews 76C 642. (63)	

A-13 Continued

DATE	NR.	PROCEEDINGS
1-19-77		JUDGMENT dtd 1-14-77 that the action is dismissed as to the Federal Defts in this action and 75C 2178. 76C 642 is dismissed. (64) (65)
2/14/77		Notice of appeal filed. Copies sent to C of A. mg
3/14/77		Scheduling order from court of appeals, ordered that record on appeal be filed on 3/21/77 filed. lg (66) (67)
3-18-77		Suggestion of death of pltff filed
3/24/77		Acknowledgment of Court of Appeals remanding case to U.S. Dist. Ct. Eastern Dist. of NY for purpose of making a proper Rule 54 b certification as to the Fed. Appellees Casper weinberger, et al. also APPEAL is dismissed as to the State appellees, Hugh L. Carey et al. and that jurisdiction be retained by court. with no additional fees. filed. lg (68)
3/29/77		Return of INDEX ON APPEAL, Acknowledgement of deputy clerk. Mailed back to C. of Appeals. filed. lg (69)
3/29/77		Copy of letter of MORTON BIRNBAUM (Counsel for pltffs) to NEAHER, J. dtd 12/15/76 filed. XXXXXXXX lg. (69)

A-14

207/1	75	2178	12	29	75	2	440	5	23	\$	OTHER	NUMBER	DEM.	YR.	NUMBER
										Injunction	0709X	BROCHHAUSEN NEAHER, J.			
PLAINTIFFS										DEFENDANTS					

CONSOLIDATED WITH 75C 1029.

| YOE, Yetta, etc.

YETTA YOE (a pseudonum), by
(a pseudonum), her mother ar
on behalf of themselves and
similarly situated.

28 U.S.C. § 1343
CIVIL RIGHTS-DISCRIMINATION
MENTAL INSTITUTION AND DENI
INSTITUTION.

RELATES: 75 C 1029

For PLAINTIFF:
Morton Birnbaum
225 Tompkins Avenue
Brooklyn, N.Y. 11216
(212) 852-5252

LAWRENCE C. KOLB, M.D., as Commis-
sioner of the Department of Mental Hygiene
of the State of New York; MORTON B.
WALLACH, M.D., as Director of Brooklyn
State Hospital, and all those similarly
situated; MAURICE STEINBERG, M.D.,
as Director of the In-Patient Psy-
chiatric Service of Downstate Medical
Center, and all those similarly
situated; ROBERT DICKES, M.D., as
Chairman of the Department of Psychiatry
of Downstate Medical Center, and all
those similarly situated; GEORGE
H. NICHOLS and ANTHONY J. DIGIOVANNA,
as Justices of the Supreme Court of the
State of New York, County of Kings,
and all those similarly situated;
ALBERT BESUNDER, as Director of the
Mental Health Information Service of
the State of New York, Second Appellate
Division, and all those similarly situated;
HUGH L. CAREY, as Governor of the State
of New York; THE STATE OF NEW YORK;
P. DAVID MATTHEWS, as Secretary of the
United States Department of Health,
Education and Welfare; ELMER W. SMITH,
as Regional Commissioner of the Social
and Rehabilitation Service of the
United States Department of Health,
Education and Welfare for Region II,
which includes the State of New York;
and, THE UNITED STATES OF AMERICA.

A-15

☐ CHECK
HERE
IF CASE WAS
FILED IN
FORMA
PAUPERIS

FILING FEES PAID

DATE

RECEIPT NUMBER

C.D. NUMBER

STATISTICAL CARDS

CARD DATE MAILED

JS-5

JS-6

YOE vs KOLB, et al

DATE	NR.	PROCEEDINGS
12-29-75		Cause on transfer received from U.S.D.C.-S.D.N.Y. and filed. Acknowledgment mailed to Clerk for receipt. (1)
1-7-76		Letter of Ralph McMurry, Asst. Atty Gen. dtd 12-31-75 filed re: assignment of action to Judge Neaher as related to 75 C 1029. (2)
2-18-76		ANSWER of the State debts filed. (3)
3-26-76		Notice of motion ret. 4-30-76 to dismiss etc., filed. (4)
5-14-76		Notice of mdion ret. 5-21-76 re: to amend the complaint etc., filed. (5)
1/13/77		By Neaher, J Memo and Order dtd 1/13/77 filed re plttf's motion to consolidate the Woe vs Mathews and Yoe vs Kolb actions is granted. The proposed consolidation of the Koe vs Mathews action, now dismissed is denied. The cases are to be consolidated under the caption Woe vs Carey, 75C 1029. Accordingly, the motions to amend the complaints are denied. Upon plttfs application and there being no just reason for delay, the Clerk of the Court is directed to enter judgement in favor of federal debts dismissing the actions Woe vs Mathews, 75C 1029 and Yoe vs Kolb 75C 2178, as to those debts. The clerk is also directed to enter judgement in favor of debts dismissing the complaint in the acti Koe vs Mathews 76C 642. See 75C 1029. ZKXZ (6)
1-19-77		JUDGMENT dtd 1-14-77 that this action and 75C 1029 are dismissed as to the Federal Defts, and that the complaint in 76C 642 is dismissed filed.in 75C 1029. mg (7)

ALL FURTHER ENTRIES TO BE MADE IN 75C ~~2178~~ 1029

APPENDIX "B"

1E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----;

KENNETH KOE, LAWRENCE LOE, MATHEW MOE,
AND NATHAN NOE, (all pseudonyms), on
behalf of themselves and all others
similarly situated,

Plaintiffs,

- v. -

F. DAVID MATHEWS, as Secretary of
the United States Department of Health,
Education and Welfare; BERNICE
BERNSTEIN, as Regional Commissioner of
The United States Department of Health,
Education and Welfare (Region II);
and, THE UNITED STATES OF AMERICA,

Defendants.

-----;

COMPLAINT FOR DECLARATORY JUDGMENTS; FOR
INJUNCTIONS; FOR COMPENSATORY AND PUNITIVE
DAMAGES; CLASS ACTION

76 C 642

75 Civ. 5923
(IBW)

Plaintiffs, by their counsel, upon information and belief, complain of the defendants as follows:

JURISDICTION

I. Plaintiffs claims arise under the Fifth and Eighth Amendments to the United States Constitution; and, under Titles XVI, XVIII and XIX of the Social Security Act of 1935, as amended.

The jurisdiction of this Court is based upon 28 U.S.C. §§ 1331, 1343 and 1361, and the aforesaid Amendments.

The matter in controversy, exclusive of interest and costs, exceeds the sum of \$10,000.00 for each named plaintiff.

Plaintiffs request declaratory judgments pursuant to 28 U.S.C. §§ 2201 and 2202; preliminary and permanent injunctions pursuant to 28 U.S.C. § 1651 as they have no adequate remedy at law; compensatory and punitive damages; attorneys' fees; and, costs.

Plaintiff seek injunctive relief restraining the enforcement of certain federal statutes and regulations for repugnance to the Constitution of the United States; and, therefore, request the convening of a three-judge District Court pursuant to 28 U.S.C. §§ 2282 and 2284.

PLAINTIFFS

II. The plaintiffs are Kenneth Koe, Lawrence Loe, Mathew Moe and Nathan Noe, all pseudonyms. All are very poor; all are over 65; all are severely mentally ill; all are chronic patients at Pilgrim State Hospital; and, all are involuntarily civilly committed.

They have standing to sue because due to their poverty, their permanent disability due to their severe mental illnesses, and their being over 65, all now receive up to \$25.00 a month as a direct federal payment for personal items under Title XVI (Supplemental Security Income or SSI) of the Social Security Act of 1935, as amended. This payment is intended only for personal items.

For the same reasons, all are now eligible for benefits under Title XIX (Medicaid) of the Social Security Act of 1935, as amended. Medicaid benefits are federal reimbursement payments made directly to the State of New York for the food, shelter, clothing and medical care provided to the plaintiffs. It amounts to 50% of the state's expenditures, and includes no payment for personal items.

Solely because Pilgrim State Hospital has lost its accreditation as a psychiatric hospital by the Joint Commission on Accreditation of Hospitals in June, 1975, the hospital is no longer eligible for indirect Medicaid reimbursement payments by the federal government.

Invidiously, and even though they are involuntarily civilly committed, as a result of this loss of accreditation, the plaintiffs are in imminent danger of losing their direct SSI benefits of \$25.00 a month or less.

III. They bring this action under Rule 23, F.R.C.P. on behalf of all state mental hospital patients, and, in particular, those who are involuntarily civilly committed, who because they are over 65; because they are impoverished; because they are permanently disabled due to their severe and chronic mental illness; and, because they are state mental hospital patients are eligible for SSI and Medicaid benefits; but, who solely because the institution in which they are incarcerated is no longer, or never was, accredited by the Joint Commission on Accreditation of Hospitals, do not receive direct SSI or indirect Medicaid payments.

The questions of law and fact are common to the entire class and the plaintiffs will fairly and adequately protect the interests of the class.

IV. Plaintiffs are prosecuting this lawsuit under pseudonyms because it is believed that is in the public interest that their true names be not made a matter of public record.

Their true names will be available only to counsel for parties herein either by an application to the Court to order the sealing of their names except to counsel; or, by counsel for plaintiffs filing a sealed envelope with the Clerk of the Court to be opened only by said counsel.

DEFENDANTS

V.
IV.

The defendants are:

A. F. David Mathews is the Secretary of the United States Department of Health, Education and Welfare. In this capacity, he has been charged with the responsibility for the administration of the programs under Titles XVI and XIX of the Social Security Act of 1935, as amended.

B. Bernice Bernstein is the Regional Commissioner of the United States Department of Health, Education and Welfare for Region II, which includes New York. In that capacity, she has been delegated overall responsibility for administration of all federal programs, under the Social Security Act of 1935, as amended, (including Titles XVI and Title XIX) for this region.

C. The United States of America.

CLAIM FOR RELIEF

VI. Plaintiffs are all very poor; are all over 65; are all permanently disabled due to severe mental illness; are all long-term chronic patients at Pilgrim State Hospital, a New York state mental hospital located in Suffolk County; and, are all involuntarily civilly committed.

VII. Because of their poverty, because they are over 65, and because they are considered to be permanently disabled, all now receive a direct payment of \$25.00 a month or less from the federal government for personal items under Title XVI §1611 (e) (1)(B) of the Social Security Act of 1935, as amended, for personal expenses.

VIII. In June, 1975, Pilgrim lost its accreditation as a psychiatric facility by the Joint Commission on Accreditation of Hospitals. Accordingly, the defendants, Mathews and Bernstein, determined that the hospital was no longer eligible for benefits under Title XIX, 42 U.S.C. §1385 (f) (5).

IX. As a result of this loss of accreditation by the Joint Commission, a private, non-governmental group, in a proceeding in which the plaintiffs were not parties, defendants intend to deprive plaintiffs of their direct SSI monthly payments of \$25.00 or less. 42 U.S.C. §1382 (e)(1)(B).

X. Accordingly, the involuntarily civilly committed in unaccredited state mental hospitals are considered as inmates of public penal institutions who receive nothing than as inmates of public medical institutions who receive these benefits.

XI. Medicaid is a federal reimbursement program wherein the federal government reimburses the State of New York, not the hospital and not the patient, 50% of the amount that was spent for food, clothing, shelter and medical care provided in an approved facility.

There is no reimbursement for personal items.

XII. Congress, therefore, recognized that certain of these patients were so poor that they had no funds for personal items. Congress recognized that none of our state mental hospitals provided for these personal items. Congress recognized that these personal items were essential for social well-being and rehabilitation.

Congress recognized that Medicaid, a reimbursement program, for food, clothing, shelter and medical care provided no funds for these essential personal items.

XIII. Congress provided, therefore, for this direct personal grant up to \$25.00 a month for personal items from SSI. The patient can use his money to purchase toilet articles, cigarettes, sodas, ice cream, cans of food to supplement an inadequate and dull institutional diet, articles of clothing to change out of an institutional wardrobe, etc.

XIV. It would be invidious for Congress to discriminate among SSI beneficiaries in state mental hospitals solely as to whether or not the hospital is accredited. De facto, the involuntarily civilly committed patient has no choice as to which hospital he is involuntarily civilly committed. Involuntary inmates cannot choose between the accredited and unaccredited state mental hospital.

XV. The invidiousness of the interpretation by the defendants reveals itself in the simple observation that the SSI beneficiary in the unaccredited institution is more likely that the patient in an accredited institution wherein he receives a grant to need SSI funds to buy food, clothing, cigarettes, etc.

XVI. Millions of Americans outside of medical institutions now receive billions of dollars annually from SSI for food, clothing, shelter and personal items. They also receive Medicaid for medical care as they are automatically considered to be medically indigent.

In addition, a large number in long-term medical institutions, e.g. nursing homes, institutions for the retarded, state mental hospitals, receive SSI benefits for personal items and Medicaid that while in the long-term medical institution provides food, clothing, shelter and medical care. This group numbers at least a million persons.

Congress intended that inmates of public penal institutions do not receive the SSI stipend for personal items. Congress intended that patients in our country's state mental hospitals receive the SSI stipend, whether the hospital is or is not accredited.

XVII. The most invidious aspect of this discrimination is that it directs itself primarily against the involuntarily, civilly committed. The voluntary state mental hospital patient, if dissatisfied with the denial of SSI benefits while in the institution, can reenter the community and receive back all his SSI benefits, for food, clothing, shelter and health care, and also for personal items.

PRAYERS FOR RELIEF

WHEREFORE, plaintiffs pray;

I. That a declaratory judgment be entered that the direct \$25.00 a month, or less, federal payment that is paid directly to eligible beneficiaries in public institutions pursuant to Title XVI, §1611 of the Social Security Act of 1935, as amended, cannot be denied to such beneficiary who is over 65, and who is an involuntary civilly committed state mental hospital patient, solely on the ground that the hospital is not accredited by the Joint Commission on Accreditation of Hospitals in that the statute does not require this accreditation; or in the alternative, if the statute does require it, such requirement is invidious and unconstitutional.

II. That a declaratory judgment be entered that the indirect federal benefit that is paid indirectly to eligible beneficiaries in public institutions - by payment in the form of partial reimbursement to the institutions - pursuant to Title XIX of the Social Security Act of 1935, as amended, cannot be denied to such beneficiary who is over 65, and who is an involuntary civilly committed state mental hospital patient, solely on the ground that the hospital is not accredited by the Joint Commission on Accreditation of Hospitals in that the statute does not require this accreditation; or in the alternative, if the statute does require it, such requirement is invidious and unconstitutional.

III. That other judgments be entered as needed,
and that preliminary and permanent injunctions be entered
enforcing these declaratory and other judgments;

IV. For compensatory and punitive damages in
the sum of \$20,000.00 for each named plaintiff, for
reasonable attorneys' fees, for costs and for such
other and further relief as to this Court may be just
and proper.

Dated: Brooklyn, New York
November 21, 1975

Respectfully submitted,

Morton Birnbaum
Morton Birnbaum

MORTON BIRNBAUM
225 Tompkins Avenue
Brooklyn, New York 11216

PAUL J. CLIFFORD
120 Broadway
New York, New York 10005

Attorneys for Plaintiffs

APPENDIX "C"

1/13/77

FILED

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ JAN 13 1977 ★

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TIME A.M.
P.M.

WALTER WOE, et al.,

Plaintiffs,

-against-

DAVID MATHEWS, et al.,

Defendants.

75 C 1029 ✓

YETTA YOE, et al.,

Plaintiffs,

-against-

LAWRENCE C. KOLB, M.D., et al.,

Defendants.

75 C 2178

KENNETH KOE, et al.,

Plaintiffs,

-against-

DAVID MATHEWS, et al.,

Defendants.

76 C 642

MEMORANDUM AND ORDER

C-1

APPEARANCES:

MORTON BIRNBAUM, ESQ.
Attorney for Plaintiffs

DAVID G. TRAGER, ESQ.
United States Attorney
Eastern District of New York
Attorney for the Federal Defendants
By CYRIL HYMAN, ESQ.
Assistant U.S. Attorney

LOUIS J. LEFKOWITZ, ESQ.
Attorney General of the State
of New York
Attorney for New York State Defendants
By RALPH L. McMURRY, ESQ.
Assistant Attorney General

NEAHER, District Judge.

Presently before this court are three suits involving the right of the mentally ill to care and treatment in State mental institutions. Upon consideration of the memoranda and affidavits filed in support of several motions and those in opposition, the pending motions are disposed of as follows.

1. Federal defendants' motion to dismiss the Yoe v. Kolb action, 75 C 2178, for lack of subject matter jurisdiction and failure to state a claim for relief, Rule 12(b)(1) and (6), F.R.Civ.P., is granted. As to federal defendants,

the subject matter of the Yoe action is identical to that of Woe v. Mathews, in that both suits allege as to federal defendants that the exclusion of patients between the ages of 21 and 65 in State mental institutions from eligibility for Medicaid benefits, 42 U.S.C. §1396d, is unconstitutional.

In Woe this court ruled that Legion v. Richardson, 354 F. Supp. 456 (S.D.N.Y.), aff'd, 414 U.S. 1058 (1973), which had held the same exclusion from Medicaid coverage to be constitutional, was binding precedent requiring dismissal of plaintiffs' claim as to federal defendants. See 408 F. Supp. 419 (E.D.N.Y. 1976). Legion, still binding precedent, likewise requires dismissal of Yoe's claims against the federal defendants. For the reasons more fully stated in Woe v. Mathews, supra, the complaint is dismissed as to federal defendants.

2... Federal defendants' motion to dismiss the Koe v. Mathews action, 76 C 642, for lack of subject matter jurisdiction and failure to state a claim for relief, Rule 12(b)(1) and (6), F.R.Civ.P., is granted.

Plaintiffs in Koe are inmates of Pilgrim State Hospital over age 65 who receive monthly direct Supplemental

Security Income (SSI) payments for personal items and who were in danger, in November 1975, of losing those benefits as a result of Pilgrim State's loss of accreditation as a psychiatric facility, a requirement under federal law. 42 U.S.C. §1385(f)(5).

In November 1975 this court denied plaintiffs' application in Woe v. Mathews for a temporary restraining order and amendment of that complaint to add new plaintiffs and a supplemental cause of action on behalf of inmates of Pilgrim State who stood to lose SSI payments due to the loss of accreditation of their hospital. Thereafter, a separate action, Koe v. Mathews, was filed seeking the same relief, that is, an injunction prohibiting cutting off the inmates' SSI payments. However, on December 18, 1975, the Social Security Administration notified the Director of Pilgrim Psychiatric Center ("Pilgrim State") by letter that inmates of that institution, over age 65, would not lose their SSI benefits as had been planned.

Plaintiffs, who are not now in danger of losing their SSI payments, cannot act as class representatives of an action premised on the allegedly illegal deprivation of those

benefits. See Sosna v. Iowa, 419 U.S. 393 (1975). Their action is moot and the complaint must be dismissed.

3. Plaintiffs' motion to amend their complaints to add new defendants and a new cause of action alleging the unconstitutional abridgement of their right to vote is denied. The proposed new claim raises a serious constitutional question.¹ But this amending cause of action, which calls into question the constitutionality of a State statute, should not be joined as part of other utterly unrelated lawsuits, which are concerned with the right to medical care and treatment of those committed to State institutions.

In the interest of orderly litigation and the forthright presentation of the proposed claim, and there being no valid reason for joinder, the court declines to permit amendment of the complaints to add this cause of action.

4. In its prior memorandum in Woe v. Mathews, supra, 408 F. Supp. at 429, the court designated as a class of plaintiffs, all persons between the ages of 21 and 65 who are or who will be involuntarily civilly committed to New

York State mental institutions. Both sides now move for reconsideration of the class designation.

State defendants move to limit the class to those committed to Brooklyn State Hospital while plaintiffs move to enlarge the class to consist of all those persons involuntarily committed to State mental institutions, irrespective of age. These motions are denied at this time, pending clarification of the issues which will form the essence of the action as discovery progresses.

5. Plaintiffs' renewed motion to amend the complaints to add the Joint Commission on Accreditation of Hospitals and its agents as defendants on a theory of a conspiracy with federal and State defendants to continue a "two-tier" system of mental care is denied for the reasons stated in the court's prior memorandum in Woe, denying a similar proposed amendment. See 408 F. Supp. at 430.

6. As to plaintiffs' motion that the court request the Special Litigation Section, Civil Rights Division, United States Department of Justice, to participate as an amicus curiae, the court notes that it has received no indication from the Department of Justice of an interest to participate.

Should the Department express an interest the court would welcome such aid and assistance as can be provided.

7. Plaintiffs' motion to consolidate the Woe v. Mathews and Yoe v. Kolb actions is granted. The proposed consolidation of the Koe v. Mathews action, now dismissed, is denied. The cases are to be consolidated under the caption Woe v. Carey, 75 C 1029.

Accordingly, the motions to amend the complaints are denied.

Upon plaintiffs' application and there being no just reason for delay, the Clerk of Court is directed to enter judgment in favor of federal defendants dismissing the actions Woe v. Mathews, 75 C 1029, and Yoe v. Kolb, 75 C 2178, as to those defendants. Rule 54(b), F.R.Civ.P.

The Clerk is also directed to enter judgment in favor of defendants dismissing the complaint in the action, Koe v. Mathews, 76 C 642.

SO ORDERED.

Edward R. Nease

U. S. D. J.

Dated: Brooklyn, New York
January 13, 1977

12/19
77-6047

STATE OF NEW YORK)
) SS.:
COUNTY OF KINGS)

AFFIDAVIT OF SERVICE

Morton Birnbaum, being duly sworn, deposes and says that he is the attorney for the plaintiffs-appellants; that on the 19th of December, 1977, he served a copy of the Brief for Appellants herein together with a copy of the Appendices thereto upon the attorney for the State Appellees herein, Hon. Louis J. Lefkowitz, 2 World Trade Center, New York, New York 10047 by first-class mail, post-paid.

Morton Birnbaum
Morton Birnbaum

Sworn to before me this
19th day of December, 1977

[Signature]

SANFORD ORLOFF
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-29/2575
Qualified in Kings County
Commission Expires March 30, 1979